(1) Supreme Court, U.S.
FILED

No. _____

991617 NOV 29 1999

In the Supreme Court of the United States

OFFICE OF THE CLERK

October Term, 1999

WILLIAM D. MCMASTER,

Petitioner,

- v-

MICHIGAN NATIONAL CORPORATION, DANIEL T. CARROLL, JOHN S. CARTON, DOUGLAS E. EBERT, SIDNEY E. FORBES, SUE L. GIN, MORTON E. HARRIS, GERALD B. MITCHELL, ROBERT J. MYLOD, WILLIAM F. PICKARD, STANTON KINNIE SMITH, JR., WALTER H. TENINGA, STEPHEN A. VAN ADEL, RICHARD T. WALSH, JAMES A. WILLIAMS, AND LAWRENCE L. GLADCHUN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Michigan

PETITION FOR A WRIT OF CERTIORARI

ROGER H. LEEMIS
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QUESTIONS PRESENTED FOR REVIEW

1. Has Petitioner raised federal questions sufficiently and in a sufficiently timely fashion to move the Court to grant the instant petition?

2. Where the Michigan supreme court simultaneously accepted an amicus curiae brief and summarily and peremptorily reversed the court of appeals decision (in an order entered merely by the clerk) without opportunity being afforded Petitioner to be heard on the merits of the appeal, has Petitioner been denied due process and equal protection under the laws?

3. Under the facts of this case, does the peremptory reversal below, without any written opinion and without citation to any authority beyond the statute itself (bootstrapping its own construction) leave an empty record; constitute a denial of due process; impede this Court's ability to undertake meaningful review of the order; and, through secret decisions, pose a grave threat to the rule of law?

LIST OF PARTIES TO PROCEEDING

The parties to the proceedings below all have been named in the caption of this case.

However, given that a brief by six amici curiae was accepted in the Michigan supreme court (although they did not seek intervention), those additional corporations are named, as follows:

Borders Group, Inc.;

Champion Enterprises, Inc.;

CMS Energy Corporation;

Federal-Mogul Corporation;

K-Mart Corporation; and

Pulte Home Corporation.

A Corporate Disclosure Statement is not required from Petitioner because Petitioner is an individual.

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Garner, "Opinions, Style of," *in* K. Hall, ed.,
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, William D. McMaster, respectfully requests that a writ of certiorari be issued to review the orders of the supreme court of the state of Michigan, to-wit: (i) the order of summary reversal entered May 18, 1999; and (ii) the order denying reconsideration entered August 31, 1999.

OPINIONS AND ORDERS BELOW

The opinions and orders of the Michigan courts (the circuit court, the court of appeals and the supreme court) are unreported. The decisions pertinent to the procedural history of this case, in chronological order, are:

Circuit Court for the Sixth Judicial Circuit
Case No. 95-505 596 CZ

Hon. John J. McDonald presiding, entered orders:

"Order Granting Summary Disposition," dated January 17, 1996 [treated by the Michigan supreme court as a judgment]. APP 15.

"Order Denying Motion for Reconsideration or in the Alternative, Rehearing," dated February 12, 1996. APP 13.

Court of Appeals
Docket No. 193 107

Per Curiam opinion and order, designated "unpublished," and dated April 24, 1998, by Markey, PJ, and Jansen and White, JJ. The panel unanimously concluded that Petitioner's rights as an MNC shareholder had been denied and remanded to the trial court for further proceedings. APP 6.

"Order" entered by the clerk on July 2, 1998, denying Respondents' motion for rehearing. APP 5.

Michigan Supreme Court
Docket No. 112 675

"Order" which was "entered at the direction of the Court" on May 18, 1999, by the clerk of the court, which: granted the motion to file a proposed brief amicus curiae; peremptorily reversed the court of appeals and reinstated the circuit court judgment. APP 4.

"Order" which was "entered at the direction of the Court" on August 31, 1999, by the clerk of the court, denying Petitioner's motion for reconsideration. APP 1.

These opinions and orders are set forth in the Appendix, at pages APP 1- 16, as indicated.

STATEMENT OF JURISDICTION

The order sought to be reviewed was entered by the clerk of the Michigan supreme court on May 18, 1999.

Petitioner filed a timely motion for reconsideration on June 3, 1999.

The clerk of the Michigan supreme court entered the order denying reconsideration on August 31, 1999. Thus, this petition is timely under Supreme Court Rule 13.1 and 13.3.

The jurisdiction of this Court is invoked under Supreme Court Rule 12 and 28 U.S.C. § 2101 and § 2104.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The pertinent texts of these provisions is set out in the Appendix, at pages APP 17-29.

STATEMENT OF THE CASE

Petitioner William D. McMaster (hereafter, "McMaster" or "Petitioner") had been at all times since 1991 the holder of ten shares of the common stock of Michigan National Corporation. Petitioner McMaster was "cashed out" over his objection on November 2, 1995, when the merger at issue took effect and all of the outstanding shares were cancelled or redeemed at a purchase price of ONE HUNDRED TEN ($110.00) DOLLARS per share. That involuntary purchase does not moot his claims; "because plaintiff was a shareholder when he instituted this suit, the subsequent action divesting him of his shares does not operate to divest him of his shareholder rights that he had at the time that the suit was filed." Michigan court of appeals opinion, APP 6, 11.

The merger.

Before the merger took effect, Michigan National Corporation (hereafter, "MNC") had been the holding company of, *inter alia*, the Michigan National Banks. At the time of the merger, MNC operated some 190 branches and was the fifth largest Michigan-based bank holding company. In the early 1990's, MNC had been experiencing a period of poor financial performance and problems at the highest levels of management. The 1994 annual meeting had been contentious and over one-third of the shares had been voted *against* management.

Publicly held corporations with such troubles often become takeover targets; MNC was no exception. In this case, it appears that the MNC Board of Directors determined to seek out a "white knight," rather than wait for another annual meeting — when they might well have been ousted — or risk a hostile bid by some suitor unwelcome to the Board.

In the event, National Australia Bank Limited A.C.N. 004044937 (hereafter, "National Australia") appeared and a friendly merger was negotiated. The "Agreement and Plan of

Merger" was dated as of February 4, 1995. Because the banking business is highly regulated, approval of several different regulators was necessary, which took quite some time. Though not directly at issue here, the Federal Reserve Board, in finally approving the merger on October 16, 1995, noted that Petitioner McMaster's pending claims would *not* be mooted by the merger.

Annual Meetings.

In prior years, MNC always had held its annual meeting in April. Its bylaws expressly specified that the corporation's "annual meetings of the stockholders shall be held at 10:00 a.m. on the second Tuesday of April . . . . [i.e., April 11, 1995]." Bylaws, Art II, § 2.1. Under Michigan corporate law, the annual meeting should have been held then, or "as soon thereafter as convenient." MCL 450.1402; MSA 21.200(402). [1]

The annual meeting was not held on April 11, nor at any time in April, nor for months thereafter. Petitioner, among others, was highly suspicious of the merger proposal, especially given that in February, it had become public knowledge that the three top MNC managers stood to benefit to the tune of TWENTY MILLION ($20,000,000.00) DOLLARS if the merger were consummated. Apparently a total of THIRTY MILLION ($30,000,000.00) DOLLARS ultimately was paid.

An observer might reasonably wonder whether such benefits, contingent on the merger, could have compromised the fiduciary judgment of the recipients. A shareholder might reasonably want to know the sorts of information that would have been available through an annual report and at the annual meeting set by the Bylaws. And shareholders

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[1] Michigan Statutes Annotated ("MSA") is a little-used alternative to the Michigan Compiled Laws. Michigan continues to require parallel citation of statutes. MCR 7.212(C)(3).

might reasonably wonder why the Board did not proceed with the annual meeting as scheduled.

Commencement of Shareholder Action.

Under Michigan corporate law, if a corporation has not held an annual meeting within 90 days after the date provided in its bylaws, any shareholder may petition the Michigan circuit court (the trial court of general jurisdiction) for appropriate relief. MCL 450.1402; MSA 21.200(402).

Petitioner McMaster commenced his action in circuit court on October 5, 1995.[2] The relief sought included not only that the annual meeting be held but that corporate information, to which they were entitled, be provided to the shareholders.

In the meantime, on June 2, 1995, a "special meeting of shareholders" was called for the limited purpose of addressing two shareholder proposals. One of those, sponsored by management, sought approval of the merger. The other, a competing proposal known as the "Stoddard Proposal," urged an alternative course of action. The Board's merger plan was approved.

Later, on July 10, 1995 the Board purported to ***schedule*** — not conduct — a shareholders' meeting. The Board's action meant that the annual meeting would be further delayed several more months, until November 30, 1995.

The merger was consummated on November 2, 1995. All shares were purchased at the per-share price of ONE HUNDRED TEN ($110.00) DOLLARS.

On November 30, 1995, the merger having been forced through, National Australia, the new sole shareholder,

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[2] Petitioner McMaster later filed another action challenging benefits received by MNC management, so-called "golden parachutes," but which is not a subject of this petition. That action, circuit c/n 95-510 300 CZ, included all parties herein plus two additional MNC managers.

purported to act by unanimous consent in lieu of an annual meeting. MNC later claimed that the new sole shareholder's action by unanimous consent mooted Petitioner's claims.

State Court Proceedings.

In the pending circuit court proceedings, Respondents (defendants in the state proceedings) argued that the unanimous consent resolution by the new sole shareholder satisfied the statutory meeting requirement of Michigan's Business Corporation Act. Respondents moved for summary disposition under applicable court rules. That motion was granted on January 17, 1996. Petitioner sought reconsideration, which was denied by order of February 12, 1996, Hon. John J. McDonald, Circuit Judge.

Petitioner McMaster filed a timely claim of appeal to the Michigan court of appeals. After submission of briefs and after oral argument, a three-judge panel of the Michigan court of appeals issued its **unanimous** *per curiam* opinion and order reversing the trial court's dismissal. That opinion and order was issued and served on April 24, 1998. The panel "[r]eversed and remanded for further proceedings consistent with this opinion[.]"

The panel also specified the manner of vindicating Petitioner's rights, including that the Board "under oath, provide answers to any questions put before them" by any persons who had been shareholders as of November 2, 1995. The panel concluded this was "the most equitable remedy" because MNC had "clearly circumvented" the statutory annual meeting requirements and thereby denied Petitioner his statutory rights as a shareholder.

Respondents sought a rehearing before the Michigan court of appeals, which was denied July 2, 1998. Absent further appellate proceedings, petitioner McMaster would have been entitled to pursue his claims in the Michigan trial court, including questioning members of the Board.

On or about July 23, 1998, Respondents filed an application for leave to appeal, seeking discretionary review before the Michigan supreme court (Dkt 112 675). Petitioner filed a brief in opposition to that application for leave to appeal, asserting that Respondents had not made the showing required[3] for granting leave to appeal.

On or about September 17, 1998, six prominent Michigan-based corporations filed a petition for leave to file a brief as amici curiae in support of Respondents' application for leave to appeal. The "Six Amici" are: Borders Group, Inc.; Champion Enterprises, Inc.; CMS Energy Corporation; Federal-Mogul Corporation; K-Mart Corporation; and Pulte Home Corporation. Consistent with practice in Michigan, the petition was accompanied by the proposed amicus curiae brief.[4]

That proposed brief argued that the relief afforded by the court of appeals was unduly burdensome to Michigan corporations and concluded: "On behalf of major corporations doing business in Michigan and incorporated under its laws, we urge the [Michigan supreme court] ***to review*** this unfortunate decision." Brief amici curiae at 19 (emphasis added). Indeed, given that brief's complaint that Michigan's corporate law was out-of-date (see footnote 1 thereof) and the fact that counsel for the Six Amici is a prominent corporate attorney[5] at a prominent corporate firm, it appears that their objections might more properly have belonged before the state legislature.

Inasmuch as the threshold question raised by the Six Amici was whether their proposed brief should be accepted,

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[3] The Michigan supreme court requires an application for leave to show one or more of six specific grounds; simple error below does not suffice. MCR 7.302(B).

[4] Unlike the Court's practice, Michigan does not require disclosure of all those making monetary contributions to the brief. See Supreme Court Rule 37.6.

[5] Mr. Moscow also is a scholar, the brief citing his Moscow, *Michigan or Delaware Incorporation*, 42 Wayne L. Rev. 1897 (1996).

and only then whether the application for leave should be granted. Petitioner did not file a response to the arguments raised in that brief because the motion to permit its filing had not been decided, nor was any filing by Petitioner then required. See MCR 7.306(C).

Several months later, May 18, 1999, without argument or any further submissions, the clerk of the Michigan supreme court, acting "at the direction of" that court, entered an order summarily reversing the court of appeals and reinstating the trial court's judgment of dismissal. The entire order was only a single paragraph of some six sentences. In the last three sentences of the order, the supreme court construed the Michigan business corporation act and carved out an exception to the requirement of an annual meeting. As that order read in pertinent part:

> The Court of Appeals erred by holding that the defendant violated MCL 450.402; MSA 21.200(402). The Board's conduct, within 15 months after the corporation's last annual meeting, of ***designating a future annual meeting date*** (November 30, 1995), was in compliance with the statute. The subsequent action of adopting a resolution designating the [new] board of directors was validly taken without a meeting pursuant to MCL 450.1407; MSA 21.200(407) because the action was taken pursuant to the written consent of ***the sole shareholder at the time***.

APP 1, 4 (emphasis added).

Petitioner timely sought reconsideration by the Michigan supreme court in a motion filed June 3, 1999. That court denied the motion for reconsideration by its order entered and served August 31, 1999.

ARGUMENT: REASONS FOR GRANTING THE WRIT

1. Federal questions were raised.

In both the circuit court and the court of appeals, the controlling issue was treated as one of state law: construction of the annual meeting provisions of the Michigan business corporation act. The federal constitutional claims arose when the supreme court simultaneously accepted the brief of the Six Amici and peremptorily reversed the court of appeals.

Petitioner was not required to have responded to that brief, because the only motion then pending was that of the Six Amici for leave to file their proposed brief. MCR 7.306(C). Nor did the Six Amici ***anticipate or seek*** that summary reversal, since their brief was intended to convince the supreme court that leave should be granted.

Indeed, Petitioner had every reason to expect the merits of an appeal would be fully briefed on the merits, if leave were granted. Michigan requires that its supreme court proceed in judicious fashion:

> Decisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

MICH CONST 1963, ART 6, § 6.

Petitioner did object in timely fashion. The earliest opportunity to raise the federal constitutional questions arising from the peremptory reversal — by clerical entry of an order, unaccompanied by any opinion — was Petitioner's motion for reconsideration and supporting brief. Therein, Petitioner argued that both the supreme court's interpretation of the business corporation act and the peremptory reversal

denied Petitioner due process of law. Petitioner's Motion for Reconsideration. ¶¶ 13-16 (June 3. 1999).

2. Simultaneously accepting the amicus curiae brief and summarily reversing the intermediate appellate court decision without opportunity being afforded Petitioner to be heard on the merits of the appeal denied Petitioner due process and equal protection under the laws.

Petitioner's right to sue to compel an annual meeting and to obtain corporate information having accrued, and petitioner having commenced his action in 1995, the subsequent actions of MNC or the supreme court could not divest or moot Petitioner's rights. The court of appeals panel was correct when it so found.

Shareholders have vested rights to information and access cannot be subsequently divested by a *sub silentio* decision. Petitioner had a property right entitling him to *some* opportunity to be heard, via at least a brief, before the court of appeals was reversed. That due process right exists by virtue of U.S. CONST. AMEND V, AMEND XIV.

In addition, MICH CONST 1963, ART 6, § 6 expressly promotes due process by requiring that "[d]ecisions of the supreme court . . . shall be in writing . . . ." That is an important part of the rule of law and, indeed, a fundamental aspect of the separation of powers: Judges adjudicate but legislators legislate. "The United States shall guarantee to every State in this Union a republican form of government . . . ." U.S. CONST. ART IV, § 4.

The disposition in the Michigan supreme court — especially given that the court of appeals had entered an unpublished opinion in favor of Petitioner — was so irregular as to raise fundamental due process concerns. The Michigan Court Rules of 1985 specify at considerable length how the

court of appeals is to decide and dispose of its caseload. Among other things, an opinion's author must be identified, except for per curiam or memorandum opinions. Those generally are not to be published, except as directed by at least two of the three judges on a panel. MCR 7.215(A). "An unpublished opinion is ***not precedentially binding*** under the rule of stare decisis. * * * " MCR 7.215(C)(1) (emphasis added).

Significant cases are to be reported: "A court opinion ***must*** be published if it: (1) establishes a new rule of law; (2) construes a . . . statute; * * * (5) involves a legal issue of continuing public interest . . . . " MCR 7.215(B) (emphasis added). Thus, it follows that the court of appeals panel did not consider its decision to be a departure from ***existing*** law. Indeed, the Six Amici seemed to agree, given their complaint that ***existing*** law was obsolete.

Because the court of appeals opinion was unpublished, the panel presumably did not believe their decision was anything other than settled law, applied to the case at hand. That is also apparent from the face of the decision itself, applying the clear language of the business corporation act. Indeed, the only case cited by the court of appeals panel was that "shall" instead of "may" indicates mandatory rather than discretionary action. Even if Respondents objected to the remedies imposed, that is far different from the claims they actually made.

Further, if the panel had not followed "the rule of law established by a prior published decision" of an earlier court of appeals panel, Michigan has a procedure analogous to *en banc* reconsideration in the federal circuits. MCR 7.215(H). There is no indication that there might have been any prior controlling authority.

All in all, the court of appeals panel apparently was confident that its decision was well within the plain language of the statute and entirely consistent with prior authority. It should not have been ***peremptorily*** reversed.

3. Peremptory reversal, without a written opinion and without citation to any authority beyond the statute itself (bootstrapping its own construction) leaves an empty record; constitutes a denial of due process; impedes this Court's ability to undertake meaningful review of the order; and, through secret decisions, poses a grave threat to the rule of law.

It is unlikely to be conducive to the rule of law, to respect for the courts or to orderly decision-making if appellate courts routinely abandon the practice of publishing their decisions. This case is especially egregious given the simultaneous receipt of the brief of the Six Amici and the peremptory reversal *by the clerk*. There is at least an appearance that all parties on appeal are equal but some — those with powerful corporate friends — are more equal than others. Given the utter silence of the justices of the Michigan supreme court themselves, and the lack of even an attempt to justify peremptory reversal, citizens (and not just Petitioner) are left to wonder just what went on.

Lord Acton is credited with observing: "Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity." And as Professor Bryan Garner notes in words equally applicable to the states' supreme courts:

> A cloistered branch of government, the Supreme Court communicates with the rest of the nation primarily through written opinions. * * * If the opinions explaining the Court's decisions make sense to us, then all is well; if they confuse or strike us as false or unjust, then our sense of the fairness of our society is weakened. * * * ***To preserve our faith in it, the Court must write well.***
>
> * * *

> President Thomas Jefferson, in well-known correspondence, protested against judicial opinions that were "huddled up in a conclave, perhaps by a majority of one, delivered as if unanimous, and [possibly] with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind by the turn of his own reasoning."

Garner, "Opinions, Style of," *in* K. Hall, ed., THE OXFORD COMPANION TO THE SUPREME COURT, at 607-608, 609, Oxford University Press (New York 1992) (emphasis added) (*quoting* Letter to Thomas Ritchie, 25 December 1820, *in* 12 WORKS OF JEFFERSON, at 177-178 (1905)).

Respondents did not accept the court of appeals decision, even though there would have been further proceedings after remand. Instead, they vehemently criticized the court of appeals in their application for leave to appeal: a "***bizarre*** remedy . . . unprecedented, ***ill-conceived*** and potentially damaging to the corporate jurisprudence of Michigan." Respondents' application for leave at 5 (emphasis added). The tenor of their application was that not only had the court of appeals panel erred grievously but that it was a flagrant disregard of "well-established and fundamental principles of corporate law." Id. At 13. If left to stand, ***even as an unpublished per curiam decision lacking precedential effect,*** MCR 7.215(C)(1), that decision was claimed to be an "acute threat to the public policy of Michigan to encourage the incorporation of businesses in this state . . . ." Id. at 13.

In other words, respondents perceived a crisis requiring the intervention of the Michigan supreme court. That theme was picked up and carried forward by the Six Amici, who told the supreme court that:

> In the view of the petitioners, the Court of Appeals opinion — which provides shocking relief without a

> full record, briefing or statutory justification — severely injures the reputation of Michigan as a hospitable climate for the conduct of corporate business. Petitioners respectfully submit that the business law of the State of Michigan and its court system deserve a better representative than this ill-conceived opinion of the Court of Appeals. Petitioners' accompanying proposed brief explains why in full detail.

Petition for leave to file brief amici curiae, ¶ 2. Indeed, because the accompanying brief merely urged that the supreme court grant leave to appeal, the Six Amici apparently expected — as did Petitioner — that it would be necessary to fully brief and argue the points they and Respondents had raised.

All of the points raised, both in the Application for Leave and in the amici brief, were, *arguendo*, debatable propositions. That is precisely the point: they should have been debated on the merits and decided in an opinion that explicated the reasoning followed by the supreme court. Instead, the peremptory and perfunctory disposition denied due process; made it difficult for this Court to determine whether discretionary review is appropriate; and lessened public confidence in the rule of law.

To make matters worse, the Michigan supreme court is the focus of intense criticism given its unusual method of electing its supreme court justices: non-partisan ballots with candidates nominated by the Democratic and Republican parties. Many observers suggest that as a result, the Michigan supreme court has become highly politicized and the focus of partisan wrangling. Indeed, the election procedure itself seems constitutionally suspect.

As one political columnist has noted:

> In blistering commentary on the corrosive impact of big money on election of Michigan

> Supreme Court justices. Chief Justice Betty Weaver predicts it will turn the 2000 judicial campaign into "one messy, negative affair."
>
> She intends . . . to propose sweeping change in the selection process. She correctly concludes it has become, for both parties, "a battle of special interests. The average Joe is out of it . . . further and further isolated from the process."

George Weeks, *"Fix is long overdue on selection for state Supreme Court."* The Detroit News, Sunday, November 28, 1999 at 7C col 1.

Two of this Court's members have expressed similar general concerns with politicized state courts, in interviews with Bill Moyers, of PBS Frontline. Mr. Justice Kennedy stated that the law "commands respect only if the public thinks the judges are neutral." And Mr. Justice Breyer cautioned that explicitly political campaigns for judges lead to "a clash of political interests. Now that's fine for a legislature. But if you have that in the court system, you will then destroy confidence that the judges are deciding things on the merits." *"Strong warnings from the Supreme Court."* U.S. News & World Report, November 29, 1999 at 36.

"Transparency" is a word much in vogue; openness to public scrutiny is its essence. Openly decided cases, with reasoning explained by the justices themselves, will not cure all ills. Openness and accountability are, however, a good start and are of constitutional dimensions.

CONCLUSION

For the reasons presented herein, this petition for certiorari should be granted.

In the alternative, this case should be remanded to the Michigan supreme court for reconsideration with instructions to enter an opinion with sufficient specificity to afford meaningful review by this Court, and jurisdiction retained.

Respectfully submitted,

ROGER H. LEEMIS
Counsel of Record for Petitioner

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APPENDIX

APPENDIX

Orders entered by the Michigan supreme court:

Michigan Supreme Court
Lansing, Michigan

Order

Entered: August 31, 1999

Elizabeth A. Weaver,
Chief Justice

112675 (50)

James H. Brickley
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.,
Justices

WILLIAM D. MCMASTER,

Plaintiff-Appellee,

v

SC: 112675
COA: 193107
OaklandCC:95-505596-CZ

MICHIGAN NATIONAL CORPORATION, DANIEL T. CARROLL, JOHN S. CARTON, DOUGLAS E. EBERT, SIDNEY E. FORBES, SUE L. GIN, MORTON E. HARRIS, GERALD B. MITCHELL, ROBERT J. MYLOD, WILLIAM F. PICKARD, STANTON KINNIE SMITH, JR., WALTER H. TENINGA, STEPHEN A. VAN ADEL, RICHARD T. WALSH, JAMES A. WILLIAMS, and LAWRENCE

L. GLADCHUN,

Defendants-Appellants.

On order of the Court, the motion for reconsideration of this Court's order of May 18, 1999 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

k0824

{ PRINTED SEAL }
{ OF THE COURT }

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the forgoing is a true and complete copy of the order entered at the direction of the Court.

August 31, 1999 *Jacqueline B. MacKinnon*
Deputy Clerk

Michigan Supreme Court
Lansing, Michigan

Order

Entered: May 18. 1999

Elizabeth A. Weaver,
Chief Justice

112675 & (46)

James H. Brickley
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.,
Justices

WILLIAM D. MCMASTER,

Plaintiff-Appellee,

v

SC: 112675
COA: 193107
OaklandCC:95-505596-CZ

MICHIGAN NATIONAL CORPORATION, DANIEL T. CARROLL, JOHN S. CARTON, DOUGLAS E. EBERT, SIDNEY E. FORBES, SUE L. GIN, MORTON E. HARRIS, GERALD B. MITCHELL, ROBERT J. MYLOD, WILLIAM F. PICKARD, STANTON KINNIE SMITH, JR., WALTER H. TENINGA, STEPHEN B. VAN ADEL, RICHARD T. WALSH, JAMES A. WILLIAMS, and LAWRENCE L. GLADCHUN,

Defendants-Appellants.

On order of the Court, the motion to file a brief amicus curiae and the application for leave to appeal from the April 28, 1998 decision of the Court of Appeals are considered. The motion to file a brief amicus curiae is GRANTED. Pursuant to MCR 7.302(F) (1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REINSTATE the judgment of the Oakland Circuit Court dated January 17, 1996, granting summary disposition to the defendants. The Court of Appeals erred by holding that the defendant violated MCL 450.402; MSA 21.200(402). The Board's conduct, within 15 months after the corporation's last annual meeting, of designating a future annual meeting date (November 30, 1995), was in compliance with the statute. The subsequent action of adopting a resolution designating the board of directors was validly taken without a meeting pursuant to MCL 450.1407; MSA 21.200(407) because the action was taken pursuant to the written consent of the sole shareholder at the time.

a0513

{ PRINTED SEAL }
{ OF THE COURT }

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the forgoing is a true and complete copy of the order entered at the direction of the Court.

May 18, 1999 *Corbin R. Davis*
Clerk

Order & opinion entered by the Michigan court of appeals:

Court of Appeals, State of Michigan

ORDER

Jane E. Markey
Presiding Judge

William D. McMaster v Michigan Natl Corp

Docket No. 193107

Kathleen Jansen

LC No. 95-505596-CZ

Helene N. White
Judges

The Court orders that the motion for rehearing is DENIED.

{ PRINTED SEAL }
{ OF THE COURT }

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

JUL 02 1998
Date

/s/ Carl L Gromek
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM D. MCMASTER,

Plaintiff-Appellee,

v

MICHIGAN NATIONAL CORPORATION, DANIEL T. CARROLL, JOHN S. CARTON, DOUGLAS E. EBERT, SIDNEY E. FORBES, SUE L. GIN, MORTON E. HARRIS, GERALD B. MITCHELL, ROBERT J. MYLOD, WILLIAM F. PICKARD, STANTON KINNIE SMITH, JR., WALTER H. TENINGA, STEPHEN A. VAN ADEL, RICHARD T. WALSH, JAMES A. WILLIAMS, and LAWRENCE L. GLADCHUN,

Defendants-Appellants.

UNPUBLISHED
APRIL 24, 1998

No. 193107
Oakland Circuit Court
LC NO. 95-505596-CZ

Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

In this action to compel an annual shareholders meeting, plaintiff appeals as of right from a January 17, 1996 order of the Oakland Circuit Court granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings.

I

Plaintiff was the owner of ten shares of common stock of Michigan National Corporation (MNC) from 1991 until November 2, 1995. Plaintiff filed this action on October 5, 1995, to compel MNC to hold its 1995 annual meeting, as required by MCL 450.1402; MSA 21.200(402) of the Michigan Business Corporation Act and MNC's bylaws. MNC's bylaws state that its annual meeting was to be held on the second Tuesday of each April; however, MNC never held an annual meeting in 1995. Rather, MNC held a special meeting on June 2, 1995 for the purpose of obtaining shareholder approval of a proposed merger with National Australia Bank, Ltd. At the June 2, 1995 meeting, the shareholders approved the merger. Defendants assert that the Board of Directors, on July 10, 1995, designated November 30, 1995 as the date of the 1995 annual meeting, provided that the merger did not occur before that date. The merger actually occurred on November 2, 1995, thus, no annual meeting was ever held in 1995.

Plaintiff also filed suit to require MNC to distribute its annual report for fiscal year 1994 to shareholders as required by MCL 450.1901; MSA 21.200(901). Defendants contend that the annual report for fiscal year 1994 was mailed to all shareholders in April 1995. Plaintiff, however, denied ever receiving an annual report.

As a result of the merger, all outstanding shares of MNC stock were canceled and converted into the right to receive $110 a share. National Americas Holdings, Ltd., a subsidiary of National Australia Bank, became the sole shareholder of MNC. Therefore, plaintiff ceased to be a shareholder of MNC on November 2, 1995.

Defendants filed a motion for summary disposition in the trial court pursuant to MCR 2.116(C)(10). Defendants

argued that they were entitled to summary disposition because plaintiff was no longer a shareholder of MNC, and because the new sole shareholder of MNC executed a written consent pursuant to MCL 450.1407; MSA 21.200(407) adopting a resolution designating the Board of Directors and, therefore, there was no need for an annual meeting. The trial court granted defendants' motion for summary disposition in an order dated January 17, 1996.

II

On appeal, plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition with respect to the annual meeting . Plaintiff notes that MCL 450.1402; MSA 21.200(402) does not provide for any exception to not hold an annual meeting, and that defendants failed to support their argument that plaintiff's statutory shareholder rights may be waived by a voluntary merger after the filing of a complaint to enforce those statutory rights. Defendants argue that plaintiff's loss of his shareholder status precludes his pursuit of this claim because even if an annual meeting were now held, plaintiff would have no right to attend. Defendants also argue that MNC's obligation to hold its annual meeting was satisfied through the written consent procedure.

MCL 450.1402; MSA 21.200(402) provides the following:

> An annual meeting of shareholders for election of directors and for such other business as may come before the meeting shall be held at a time as provided in the bylaws, unless such action is taken by written consent as provided in section 407. Failure to hold the annual meeting at the designated time, or to elect a sufficient number of directors at the meeting or any adjournment thereof, does not affect otherwise

> valid corporate acts or work a forfeiture or give cause for dissolution of the corporation, except as provided in section 823. If the annual meeting is not on the date designated therefore. the board shall cause the meeting to be held as soon thereafter as convenient. If the annual meeting is not held for 90 days after the date designated therefor, or if no date has been designated for 15 months after organization of the corporation or after its last annual meeting, the circuit court of the county in which the principal place of business or registered office of the corporation is located, upon application of a shareholder, may summarily order the meeting or the election, or both. to be designated in the order. At any such meeting ordered to be called by the court, the shareholders present in person or by proxy and having voting powers constitute a quorum for transaction of the business designated in the order.

The statute clearly states that the annual meeting *shall* be held at the time as provided for in the bylaws. Further, the bylaws provided that the annual meeting of the shareholders *shall* be held on the second Tuesday of April, or as long as fifteen months after the 1994 annual meeting. It is undisputed that no annual meeting was ever held in 1995. much less on the second Tuesday of April. In this case, it is clear that both the statute and the bylaws were violated when no annual meeting was held in 1995, especially considering the mandatory language of both provisions. See *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994) (the use of the term "shall" rather than "may" indicates mandatory rather than discretionary action). As plaintiff correctly notes. there is no exception contained in the statute that would exempt an annual meeting.

We cannot accept defendants' argument that MNC's obligation to hold it [sic] annual meeting was satisfied

through the written consent procedure. Pursuant to MCL 450.1407(2); MSA 21.200(407)(2) any action required by the act to be taken at an annual meeting of shareholders may be taken without a meeting if, before or after the action, all the shareholders entitled to vote consent in writing. In this case, MNC received a unanimous written consent from its sole shareholder National Americas Holdings, Ltd. on November 16, 1995. Although it is permissible under MCL 450.1407(2); MSA 21.200(407)(2) to obtain written consent to waive the annual meeting after the meeting should have been held, MNC could not obtain such consent from one that was not a shareholder at the relevant time. In other words, MNC circumvented the clear dictates of MCL 450.1402; MSA 21.200(402) by obtaining consent from a shareholder different from those who were entitled to attend the annual meeting that should have been held in April. We cannot allow National Americas Holdings, Ltd. to "consent " to a waiver of the annual meeting after it obtained its status as sole shareholder, thereby depriving the previous shareholders of their rights under MCL 450.1402; MSA 21.200(402). Most importantly, we further note that there is certainly no indication in the record that the shareholders in existence before National American Holdings, Ltd. gave their proxy to National American Holdings, Ltd. to vote on their behalf.

Accordingly, we hold that there is no valid written consent in this case in conformance with MCL 450.1407(2); MSA 21.200(407)(2). National Americas Holdings, Ltd. could not purport to waive the rights of shareholders who existed at the time that the annual meeting should have been held.

We also reject defendants' argument that plaintiff's loss of his shareholder status precludes his pursuit of this claim. When plaintiff filed this action in the circuit court on October 5, 1995, he was a shareholder of MNC. It was not until November 2, 1995, that plaintiff ceased to become a

shareholder of MNC. Pursuant to MCL 450.1489; MSA 21.200(489), a shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors are illegal, fraudulent, or willfully unfair and oppressive to the shareholder. When this suit was filed, plaintiff was a shareholder of MNC. It was only after the suit was filed, requesting that an annual shareholders meeting for 1995 be held, that plaintiff was divested of his shares in MNC. Therefore, because plaintiff was a shareholder when he instituted this suit, the subsequent action divesting him of his shares does not operate to divest him of his shareholder rights he had at the time that the suit was filed.

Moreover, MCL 450.1402; MSA 21.200(402) provides that the failure to hold the annual meeting does no affect otherwise valid corporate acts. Here, there is no claim that the merger is otherwise invalid, and indeed, the merger was approved by the shareholders at a special meeting. Therefore, we remand this case to the circuit court with special instructions that the Board of Directors shall, under oath, provide answers to any questions put before them by any persons who were shareholders of MNC before the merger on November 2, 1995. Although the remedy in this case is somewhat difficult to fashion, we find this to be the most equitable remedy since MNC has clearly circumvented the dictates of MCL 450.1402; MSA 21.200(402) by failing to hold an annual meeting for 1995.

III

Plaintiff also contends that MNC failed to provide him with a 1994 annual report. Defendants state that the annual report for fiscal year 1994 was mailed to all shareholders in April 1995.[1] Plaintiff, however, denied ever receiving an annual report. MCL 450.1901; MSA

21.200(901) requires a corporation to distribute a financial report to each shareholder for each financial year. We are unable to determine with certainty whether plaintiff ever received the 1994 annual report. On remand, we simply direct MNC to ensure that plaintiff has received the 1994 annual report and that if plaintiff has not received one, then one shall be provided to him. If plaintiff has already received the 1994 annual report, then no further remedy is required.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Helene N. White

[1] We note that a 1994 annual report has been attached to defendants' appellate brief. Thus, it should be simple to provide the report to plaintiff.

Orders entered by the Michigan circuit court:

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF OAKLAND

WILLIAM D. MCMASTER,

Plaintiff,

-vs- NO. 95-505596-CZ

MICHIGAN NATIONAL CORPORATION, a Michigan corporation, et al,

Defendants

_____/

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ORDER DENYING MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE, REHEARING

At a session of said Court held in the Courthouse in the City of Pontiac, County of Oakland, and State of Michigan on February 12, 1996.

PRESENT: HON. JOHN J. MC DONALD,
CIRCUIT JUDGE

This matter having come before the Court upon the Motion filed herein by Plaintiff and the Court being fully advised in the premises;

IT IS HEREBY ORDERED. that the Motion for Reconsideration or Rehearing is denied for the reason that the Motion merely presents the same issues ruled on by the Court, either expressly or by reasonable implication, pursuant to MCR 2.119(F)(3).

/s/ John J. McDonald

JOHN J. MC DONALD, CIRCUIT JUDGE

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF OAKLAND

WILLIAM D. MCMASTER.

Plaintiff.

-vs- NO. 95-505596-CZ

MICHIGAN NATIONAL CORPORATION, a Michigan corporation, et al,

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Detroit, MI 48243

ORDER GRANTING SUMMARY DISPOSITION

At a session of said Court held in the Courthouse in the City of Pontiac, County of Oakland, and State of Michigan, on **January 17, 1996.**

PRESENT: HON. JOHN J. MC DONALD, CIRCUIT JUDGE

This matter having come before the Court upon Defendant's [sic] motion for Summary Disposition; and the Court having carefully reviewed the pleadings and being fully advised in the premises; makes the following ruling.

Plaintiff brought this action seeking a provisional injunction to prevent the merger involving Michigan National Corporation. and an order for a shareholders' meeting, and a request for the corporate financial statement.

Having carefully considered the supplemental briefs submitted by both counsel, the Court finds that Defendant is entitled to Summary Disposition. Accordingly, it is ordered that Defendant's motion is and the same is hereby GRANTED.

/s/ John J. McDonald

JOHN J. MC DONALD, CIRCUIT JUDGE

Federal Constitutional authorities:

US CONST ART IV. § 4

Section 4. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

U S CONST AMENDS V, XIV

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or

emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statutory authorities:

Title 28, United States Code, §§ 2101, 2104

Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good

cause shown. may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari. the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.

Sec. 2104. Reviews of State court decisions

A review by the Supreme Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States.

Michigan Constitutional provision:

MICH CONST 1963, ART 6, §6

§ 6 Decisions and dissents; writing, contents.
Sec. 6. Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

Michigan statutory authorities:

[EXCERPTS] MICHIGAN BUSINESS CORPORATION ACT, 1972 Public Act No. 284,

450.1402 Annual meeting of shareholders. [M.S.A. 21.200(402)]
Sec. 402. An annual meeting of shareholders for election of directors and for such other business as may come before the

meeting shall be held at a time as provided in the bylaws, unless such action is taken by written consent as provided in section 407. Failure to hold the annual meeting at the designated time, or to elect a sufficient number of directors at the meeting or any adjournment thereof, does not affect otherwise valid corporate acts or work a forfeiture or give cause for dissolution of the corporation, except as provided in section 823. If the annual meeting is not held on the date designated therefor, the board shall cause the meeting to be held as soon thereafter as convenient. If the annual meeting is not held for 90 days after the date designated therefor, or if no date has been designated for 15 months after organization of the corporation or after its last annual meeting, the circuit court of the county in which the principal place of business or registered office of the corporation is located, upon application of a shareholder, may summarily order the meeting or the election, or both, to be held at such time and place, upon such notice and for the transaction of such business as may be designated in the order. At any such meeting ordered to be called by the court, the shareholders present in person or by proxy and having voting powers constitute a quorum for transaction of the business designated in the order.

450.1407 Corporate action without meeting of shareholders. [M.S.A. 21.200(407)]

Sec. 407. (1) The articles of incorporation may provide that any action required or permitted by this act to be taken at an annual or special meeting of shareholders may be taken without a meeting, without prior notice, and without a vote, if consents in writing, setting forth the action so taken, are signed by the holders of outstanding shares having not less than the minimum number of votes that would be necessary to authorize or take the action at a meeting at which all shares entitled to vote on the action were present and voted. The written consents shall bear the date of signature of each

shareholder who signs the consent. No written consents shall be effective to take the corporate action referred to unless, within 60 days after the record date for determining shareholders entitled to express consent to or to dissent from a proposal without a meeting, written consents dated not more than 10 days before the record date and signed by a sufficient number of shareholders to take the action are delivered to the corporation. Delivery shall be to the corporation's registered office, its principal place of business, or an officer or agent of the corporation having custody of the minutes of the proceedings of its shareholders. Delivery made to a corporation's registered office shall be by hand or by certified or registered mail, return receipt requested. Prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to shareholders who would have been entitled to notice of the shareholder meeting if the action had been taken at a meeting and who have not consented in writing. If the action consented to would have required filing of a certificate under any other section of this act, if the action had been voted upon by shareholders at a meeting of the shareholders, the certificate filed under such other section shall state, in lieu of any statement required by the section concerning a vote of shareholders, that both written consent and written notice have been given as provided in this section.

(2) Any action required or permitted by this act to be taken at an annual or special meeting of shareholders may be taken without a meeting, without prior notice, and without a vote, if before or after the action all the shareholders entitled to vote consent in writing. If the action consented to would have required filing of a certificate under any other section of this act if the action had been voted upon by shareholders at a meeting, the certificate filed under the other section shall state, in lieu of any statement required by the section concerning a vote of shareholders, that written consent has been given as provided by this section.

Michigan rule provisions:

Michigan Court Rules of 1985

Rule 7.215 Opinions, Orders, Judgments, and Final Process from Court of Appeals.

(A) Opinions of Court. An opinion must be written and bear the writer's name or the label "per curiam" or "memorandum" opinion. The Supreme Court reporter of decisions shall not publish a per curiam or memorandum opinion unless a majority of the judges deciding the case directs the reporter to do so at the time it is filed with the clerk. A copy of an opinion to be published must be delivered to the reporter not later than when it is filed with the clerk. The reporter is responsible for having those opinions published as are opinions of the Supreme Court, but in separate volumes containing opinions of the Court of Appeals only, in a form and under a contract approved by the Supreme Court.

(B) Standards for Publication. A court opinion must be published if it:

(1) establishes a new rule of law;

(2) construes a provision of a constitution, statute, ordinance, or court rule;

(3) alters or modifies an existing rule of law or extends it to a new factual context;

(4) affirms a principle of law not applied in a recently reported decision;

(5) involves a legal issue of continuing public interest;

(6) criticizes existing law; or

(7) creates or resolves an apparent conflict of authority. whether or not the earlier opinion was reported.

(C) Precedent of Opinions.

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.

(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

(D) Judgment.

(1) When the Court of Appeals disposes of an original action or an appeal, whether taken as of right, by leave granted, or by order in lieu of leave being granted, its opinion or order is its judgment. An order denying leave to appeal is not deemed to dispose of an appeal.

(2) The clerk shall send a certified copy of the opinion or order, with the date of filing stamped on it, to each party, and. In an appeal, to the court or tribunal from which the appeal was received. In criminal cases, the clerk shall provide an additional copy of any opinion or order disposing of an appeal or of any order denying leave to appeal to the defendant's lawyer, which the lawyer must promptly send to the defendant. An opinion or order is notice of the entry of judgment of the Court of Appeals.

(E) Execution and Enforcement.

(1) Routine Issuance. Unless otherwise ordered by the Court of Appeals or the Supreme Court or as otherwise provided by these rules,

(a) the Court of Appeals judgment is effective after the expiration of the time for filing a timely application for leave to appeal tot he Supreme Court, or, if such an

application is filed, after the disposition of the case by the Supreme Court;

(b) execution on the Court of Appeals judgment is to be obtained or enforcement proceedings had in the trial court or tribunal after the record has been returned (by the clerk under MCR 7.201[I] or by the Supreme Court clerk under MCR 7.311[B]) with a certified copy of the court's judgment or, if a record was not transmitted to the Court of Appeals, after the time specified for return of the record had it been transmitted.

(2) Exceptional Issuance. The court may order that a judgment described in subrule (E) has immediate effect. The order does not prevent the filing of a motion for rehearing, but the filing of the motion does not stay execution or enforcement.

(F) Entry, Issuance, Execution, and Enforcement of All Other Orders. An order other than one described in subrule (E) is entered on the date of filing. The clerk must promptly send a certified copy to each party and to the trial court or tribunal. Unless otherwise stated, an order is effective on the date it is entered.

(G) Rehearing.

(1) A motion for rehearing may be filed within 21 days after the date of the order or the date stamped on an opinion. The motion shall include all facts, arguments, and citations to authorities in a single document and shall not exceed 10 double-spaced pages. A copy of the order or opinion of which rehearing is sought must be included with the motion. Motions for rehearing are subject to the restrictions contained in MCR 2.119(F)(3).

(2) A party may answer a motion for rehearing within 14 days after the motion is served on the party. An answer to a motion for rehearing shall be a single document and shall not exceed 7 double-spaced pages.

(3) The clerk will not accept for filing a motion for rehearing of an order denying a motion for rehearing.

(H) Resolution of Conflicts in Court of Appeals Decisions.

(1) Precedential Effect of Published Decisions. A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

(2) Conflicting Opinion. A panel that follows a prior published decision only because it is required to do so by subrule (1) must so indicate in the text of its opinion, citing this rule and explaining its disagreement with the prior decision. The panel's opinion must be published in the official reports of opinions of the Court of Appeals.

(3) Convening of Special Panel.

(a) Poll of Judges. Within 14 days after release of the opinion indicating disagreement with a prior decision as provided in subrule (2), the chief judge must poll the judges of the Court of Appeals to determine whether a special panel should be convened to rehear the case for the purpose of resolving the conflict that would have been created but for the provisions of subrule (1). Special panels may be convened to consider outcome-determinative questions only.

(b) Order. Immediately following the poll, an order reflecting the result must be entered. The chief clerk of the Court of Appeals must provide a copy of the order to the Clerk of the Supreme Court. The order must be published in the official reports of opinions of the Court of Appeals.

(4) Composition of Panel. A special panel convened pursuant to this rule consists of 7 judges of the Court of Appeals selected by lot, except that judges who participated in either the controlling decision or the opinion in the case at bar may not be selected.

(5) Consideration of Case by Panel. An order directing the convening of a special panel must vacate the prior opinion in the case at bar. The parties are permitted to file supplemental briefs, and are entitled to oral argument

before the special panel unless the panel unanimously agrees to dispense with oral argument.

(6) Decision. The decision of the special panel must be by published opinion or order and is binding on all panels of the Court of Appeals unless reversed or modified by the Supreme Court.

(7) Rehearing; Appeal. There is no appeal from the decision of the Court of Appeals as to whether to convene a special panel. As to the decision in the case at bar, the time limits for moving for rehearing or for filing an application for leave to appeal to the Supreme Court run from the date of the order declining to convene a special panel or, if a panel is convened, from the date of the decision of the special panel.

Rule 7.306 **Briefs in Calendar Cases**

(A) Form of Briefs. Briefs in calendar cases must be prepared in the form provided in MCR 7.212(C) and (D) and produced as provided in MCR 7.309. For the purposes of this rule, references in MCR 7.212(C) and (D) to the "record" should be read as referring to the appendix.

(B) Length of Brief; Summary of Argument. In a brief in which the argument of any one issue exceeds 20 pages, a summary of argument must be included. The summary must be a succinct, accurate, and clear condensation of the argument actually made in the body of the brief and may not be a mere repetition of the headings under which the argument is arranged. Unless the Court allows a longer brief, a brief prepared in the manner authorized under MCR 7.309 may not exceed 50 pages if printed on 6¼ by 9¼ inch paper or, if on 8½ by 11 inch paper, may not exceed 60 pages, excluding the table of contents, index of authorities, and appendix, but including the summary of argument.

(C) Amicus Curiae Briefs. An amicus curiae brief may be filed only on motion granted by the Court and must conform to subrules (A) and (B) and MCR 7.309. The time for filing the brief corresponds with the time for filing the brief of the party whose position the amicus curiae supports. An amicus curiae may not participate in oral argument except by Court order.